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IN THE

Supreme Court of the United States

_____ TERM, 1971

No. 70-280

STATE OF OHIO,

Respondent,

vs.

ROBERT SUMMERLIN,

Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43215

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ARGUMENT

The literary publication, to-wit: "69 Potion", is not protected by the First Amendment to the Constitution of the United States of America, being material utterly without redeeming social value, being patently offensive, and falling below the contemporary community standard in appealing to prurient interests.

This Court has in *Redrup v. New York*, 368 U. S. 767 (1967), set forth the tests which the triers of fact must

apply in determining whether a book is or is not constitutionally protected by the First Amendment provision pertaining to freedom of the press. The tests are as follows, *Redrup, supra,* pp. 770 and 771:

> "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value emphasizing that 'the three elements must coalesce' and that no such material can 'be proscribed unless it is found to be *utterly* without redeeming social value.' "

Petitioner in seeking review by this Court is asking that it be determined that the book "69 Potion" does not meet these tests. In support of this contention petitioner cites a number of cases involving other books which have been reversed by this Court, most without opinion, citing *Redrup, supra,* as authority for the reversal.

No one can dispute that a book, a motion picture, or a picture is a unique thing, and that each book must stand or fall as far as the test of obscenity is concerned on its own contents. Petitioner has failed to cite a case where any court in the United States has found the book, "69 Potion", not obscene.

It is submitted that this court cannot say that reasonable minds could only come to the conclusion that the book, "69 Potion", was not obscene under the *Redrup* test as the triers of fact have found.

Petitioners urge that the failure of the Supreme Court of Ohio to make an independent judicial determination on the question of the obscenity of the material involved denied petitioners the rights of the First and Fourteenth

Amendment. Acceptance of this contention would have the effect of requiring a trial de nova at every level of appeal. This procedure would not only subject the Courts to a tremendous burden, but would also result in a deplicity of process never intended by this Court in setting forth the opinion in *Jacobellis v. Ohio*, 278 U. S. 184, in which the Court noted at page 189, citing Lockhart and McClure, Censorships of Obscenity; The Developing Constitutional Standard, 45 Minn L. Rev. 5, 116 at page 119:

> "If freedom is to be preserved, neither government censorship experts nor juries can be left to make the final effective decisions restraining free expression. Their decisions must be subject to effective, independent review, and we know of no group better qualified for that review than the appellate judges of this country under the guidance of the Supreme Court."

The triers of fact in this case was a three judge panel which decided without dissent that the material involved failed to meet the *Redrup* tests of permitted material. The Court of Appeals of Huron County made the finding that "in our independent judgment" the material involved was hard core pornography. (Petitioner's Appendix B, page B-1). The dissenting judge in the 3-2 decision also concurred with the conclusion that "the photographs and textual matter therein, when considered together or apart, constitute hard core pornography". (Petitioner's Appendix B, page B-2).

CONCLUSION

In light of the fact that five of six judges who had an opportunity to make an independent judicial determination of the material and that they have all reached the same conclusion, it is apparent that petitioner's contention that the Supreme Court of Ohio deprived him of the

privileges and immunities of the First and Fourteenth Amendment by dismissing the appeal for want of a substantial constitutional question, is without merit.

Respectfully submitted,

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and

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